Nos. 18-1778, 18-1895

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

CHARTER COMMUNICATIONS, LLC,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

Agency Nos. 07-CA-140170, 07-CA-145726, 07-CA-147521

CHARTER COMMUNICATIONS, LLC'S REPLY BRIEF

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INTRODUCTION

In this case, the Administrative Law Judge ("ALJ") and—to an even greater degree—the National Labor Relations Board ("Board") ignored contradictory evidence presented by the General Counsel and picked scattered fragments of testimony to reach unwarranted conclusions, while ignoring contradictions and demonstrable lies by the General Counsel's own witnesses. The Board now continues that approach in this Court to attempt to justify its decision. Still, the Board cannot avoid the plain fact that the General Counsel's witnesses lied to their employer, lied on the witness stand, and contradicted each other. There is no way to create a coherent theory of violations of the National Labor Relations Act (the "Act") when all the evidence is considered. The Board cannot demonstrate substantial evidence in support of its findings.

In particular, Charter was reasonable to conclude—after extensive investigation—that employees French, DeBeau, and Schoof had engaged in misconduct warranting termination. The General Counsel fails to cite facts in the record that make this conclusion unreasonable, or to any other evidence the misconduct was a pretext to fire them for their real or imagined union activities.

To avoid the statute of limitations, the Board now pushes for an expansion of its own test in *Redd-I, Inc.*, 290 NLRB 1115 (1988). But the timely and untimely charges involve different legal theories and revolve around different events, and therefore cannot be "closely related" as the test requires.

Finally, the General Counsel does not demonstrate substantial evidence that Charter otherwise violated the Act. Charter engaged in appropriate actions during the July 15, 2014 handbilling, as highlighted by the General Counsel's case law. Charter did not cross any lines with French during his July 16, 2014 conversation with Teenier or his July ride-out with Culver, according to French's own testimony. Lothian's September 30, 2014 conversation with French had nothing to do with union activity other than an offhand remark (again, according to French himself). And Charter affirmatively showed it would have re-assigned French, Schoof, and DeBeau to complete the necessary audit of the rural areas notwithstanding any union activity. While the General Counsel ascribes anti-union motivations to all of these acts, its case rests mostly on the heavily biased and oft-contradicted testimony of TJ Teenier.

Charter respectfully requests the Court set aside the Board's Decision & Order.

ARGUMENT

I. The Board erred by concluding that Charter terminated French, DeBeau, and Schoof due to alleged Union activity.

Charter had good reason to investigate Lothian's complaints about DeBeau, Schoof, and Teenier, which had nothing to do with the union. It terminated French, DeBeau, and Schoof for dishonesty during the investigation, and—for DeBeau and Schoof—for performing non-company work on company time. Charter also terminated two managers, Teenier and Felker, whom the Board contended were key players in Charter's anti-union efforts, yet still held that this layoff was just pretext.

As Charter explained in its opening brief, Charter would have terminated these employees regardless of French's connection to the handbilling, or any perceived connection by DeBeau and Schoof—honesty and integrity are incredibly important for field auditors. (Charter Br. 7.) The Board erred by applying the wrong standard when it found that these reasons were mere pretext to hide anti-union animus, holding that Charter's conclusion about these employees was ***wrong*** (versus examining whether Charter's conclusion was ***reasonable***). (*Id.* at 5-6.) The General Counsel's response failed to address this error, instead asking the Court to second-guess Charter's decision. *See Sam's Club*, 349 NLRB 1007, 1009 n.10 (2007) ("[A]s we have so often said, management is for management. Neither

the Board nor Court can second-guess it . . . .” quoting *N.L.R.B. v. Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir. 1964).)

A. French’s termination did not violate the Act.

Charter terminated French because it believed he lied to obstruct the investigation. There is no doubt that French was confrontational and disruptive during the key investigatory meeting.[1] Charter reasonably concluded French lied about Lothian telling him “everything” about the investigation and recently having a gun at work. (Charter Br. 16-17.)

French’s credibility is a broader issue in this case. The Board’s holdings rely heavily on the conflicting testimony of French and Teenier, both the General Counsel’s witnesses. In some cases, the Board credited Teenier when he contradicted French, and sometimes it believed French when he contradicted Teenier—whichever one supported a violation in that instance. Sometimes the Board credited French even though he contradicted himself. For example, French testified that, after his termination, Teenier told him Charter had ordered Teenier to push French out due to his union involvement. (4/26/16 Hrg. Tr. 83:24-84:4, PgID 90-91.) Teenier—who generally sought to damage Charter at every opportunity—

[1] The Board correctly does not argue that French’s obstructive conduct during the investigatory interview was conduct protected by the Act.

denied this, saying nobody at Charter told him to get rid of French. (4/29/16 Hrg. Tr. 501:21-25, PgID 511; *see also* 565:14-22, PgID 575). As an even starker example, French's affidavit said he told Peters that Lothian had mentioned a gun during the September 30, 2014 safety check; at the hearing, French admitted that was false. (4/27/16 Hrg. Tr. 237:3-6, 242:3-245:8, PgID 245, 250-253.)

The record as a whole must be examined to determine whether substantial evidence to support the Board's finding exists. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 465-66 (1951); *DTR Indus., Inc. v. N.L.R.B.*, 39 F.3d 106, 110 (6th Cir. 1994) ("[O]ur review must include consideration of any record evidence that runs contrary to the Board's findings."). For this reason, contradictory findings do not demonstrate substantial evidence. *Thomas Indus., Inc. v. N.L.R.B.*, 687 F.2d 863, 866 (6th Cir. 1982). Here, when all the testimony is considered, no reasonable mind could base a decision on Teenier's and French's conflicting and inconsistent testimony.

1. Charter reasonably believed French had lied about Lothian breaching confidentiality.

As the ALJ noted, Charter's Sr. Director of Human Resources had testified French's lie about Lothian breaching confidentiality was one of the "primary reasons" for the termination, and Charter's investigation report "ma[de] it absolutely clear that [dishonesty] was a basis for French's discharge." (3/27/18

NLRB Decision & Order 20, PgID 2402; Charter Br. 27.) The ALJ incorrectly held that this reason was pretextual, and in its exceptions to that decision, Charter reiterated that Peters found French had lied by falsely "claim[ing] to know 'everything' about the investigation."[2] (8/15/16 Hrg. Tr. 1489:11-1490:11, PgID 1504-1505.)

The General Counsel does not address the problems with relying on Schoof's double-hearsay account about Lothian breaching confidentiality. (Charter Br. 31.) Nor does the General Counsel claim French is a credible witness. Instead, it claims the finding is pretextual because Charter "made no attempt to pursue [] leads" about "two other employees [who] knew about the investigation." (NLRB Br. 44.) But one of these employees (Tom Schuetz) had reported to Peters he knew nothing about the investigation and that Lothian "didn't talk about anything specific or that there even was an investigation." (8/15/16 Hrg. Tr. 1514:20-1515:15, PgID 1529-1530.) The other employee, Lucas Watkins, did not say he knew about any investigation, only that he was aware of the underlying misconduct by Teenier, Felker, DeBeau, and Schoof. (*Id.* at 1527:13-1528:23,

[2] Charter raised this issue in its opening brief. (Charter Br. 16.) The General Counsel therefore is incorrect that Charter has waived it. (NLRB Br. 43); *see Tri-State Wholesale Bldg. Supplies, Inc. v. N.L.R.B.*, 657 F. App'x 421, 425 (6th Cir. 2016) (holding argument waived because petitioner "failed to raise it in its exceptions to the administrative law judge's opinion or in its opening brief on appeal.").

PgID1542-1543.) Peters had no evidence that Schuetz or Watkins were being untruthful—this is not evidence Peters was unreasonable to find French dishonest.

The General Counsel's final argument that Charter's conclusion was unreasonable—that French had no discernable reason to lie—also lacks plausibility. (NLRB Br. 44.) Lothian had complained to human resources about misconduct by French's teammates Schoof, DeBeau, and Felker. There can be no doubt that French was trying to discredit Lothian. He affirmatively tried to get Lothian in trouble by trying to redirect his investigatory interview from questions about Schoof, DeBeau, and Teenier to Lothian's conduct. He then called Peters and asked her if he could report to Felker instead of Lothian. (8/15/16 Hrg. Tr. 1493:19-1494:14, PgID 1508-1509.) When asked, French said that he was not fearful in his job and did not feel unsafe, notwithstanding his recent accusation about the gun. (*Id.*) Peters found French's concerns disingenuous and again questioned the timing of his request to transfer from Lothian to Felker. (8/15/16 Hrg. Tr. 1532-1533, PgID 1547-1548.) As such, Charter's conclusion that French sought to divert the investigation and had lied to do so was reasonable, and there was not "substantial evidence" to support the Board's conclusion otherwise.

2. Peters reasonably concluded French had lied about Lothian bringing guns to work.

The record does not support the Board's claims that Lothian "regularly" brought guns to work. The testimony cited only involves one alleged incident in 2013. (NLRB Br. 45 (citing 6/1/16 Hrg. Tr. 881:6-882:1, PgID 893-894; 6/2/16 Hrg. Tr. 1205:14-1208:10, PgID 1218-1221; 6/3/16 Hrg. Tr. 1302:10-1303:10, PgID 1316-1317).) This appears to be the incident French tried to dredge up when he abruptly changed the subject after being asked about misconduct by Schoof, DeBeau, and others, stating Lothian had a gun at work two days prior. (8/15/16 Hrg. Tr. 1489-1490, PgID 1504-1505.) Peters investigated and concluded that French lied about this to try to discredit Lothian. (*Id.* at 1537-1549, PgID 1552-1564.) French admitted at the hearing he had not given Peters complete information in response to her questions, and that Lothian had not said anything about guns at the safety check. (4/27/16 Hrg. Tr. 237:3-6, 242-245, PgID 245, 250-253.) Peters immediately told French she would investigate the gun allegation, and she did, finding that details French gave about an earlier alleged incident did not add up. (Charter Br. 32-33.)

Peters' conclusion that French had lied was reasonable based on the circumstances and evidence she reviewed. In claiming Peters was unreasonable, the General Counsel (and Board) relied ***solely*** on French's "confusing and/or contradictory" testimony about what Lothian said about guns, when Lothian made

these statements and when he saw Lothian with a gun." (3/27/18 NLRB Decision & Order 18, PgID 2400.) The General Counsel does not address French's offering five different stories about the alleged gun incident, or how that affects French's credibility. (Charter Br. 33.) French's inconsistent versions of what happened, along with his hostile behavior during the investigation and circumstances of his allegation, only prove Peters' conclusion was reasonable.

Finally, the idea that French's conduct would "not in any way [have interfered]" with the investigation is not supportable. (NLRB Br. 46.) Charter was asking its employee to provide truthful information to help it understand whether and to what extent Schoof, DeBeau, and others had misused company time; in response, French was combative, and made serious and untrue accusations about the accuser.

As a last resort, the Board asks the Court to compare employees without any useful information. (*Id.*) None of the alleged "comparators" cited by the Board did anything similar to this. (3/27/18 NLRB Decision & Order 9-10, PgID 2391-2392.) None involved employees lying during and impeding an investigation, or trying to discredit someone who has complained to human resources. (*Id.*) A generic list of other employees disciplined does not create any useful comparisons. The apples-to-oranges analysis is not substantial evidence that Charter acted differently when faced with a disruptive, uncooperative, deceitful interviewee.

B. DeBeau's and Schoof's terminations did not violate the Act.

1. There was not substantial evidence Charter mistakenly thought DeBeau and Schoof were involved in union activity.

The ALJ concluded that Charter did not terminate DeBeau and Schoof for discriminatory reasons. As with French, the Board relied on contradictory and fragmented testimony to find otherwise. The ALJ got this one right. The Board, however, chose to reverse this decision based solely on the unreliable testimony of Teenier.[3]

Neither DeBeau nor Schoof was involved in any union activity and Charter did not suspect them of supporting the union. The General Counsel argues to the contrary without support from the record. While the General Counsel cites to General Counsel's Exhibit 29 (PgID 2054) as proof Charter "identified Schoof as a possible union supporter," (NLRB Br. 48), the only reference to Schoof on that page of management notes says: "Ray Schoof – no concerns – loves Charter." This is not "substantial evidence" Charter thought Schoof was a union sympathizer

[3] The ALJ's conclusions contribute to the lack of substantial evidence supporting the Board's findings. *Universal Camera Corp.*, 340 U.S. at 496 ("We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion.")

and wanted to get rid of him for it – it shows the opposite. As for DeBeau, the General Counsel points to DeBeau's testimony that he told Teenier he "wasn't really interested in going back to" a union after a bad experience at his last job. (NLRB Br. 48 (citing 6/2/16 Hrg. Tr. 1018:4-1019:7, PgID 1031-1032).) Thus, there is no real evidence that Charter believed DeBeau and Schoof were supporting the union.

In reality, the only "evidence" Charter suspected DeBeau or Schoof of union involvement was Teenier's testimony that a "technical manager" brought up DeBeau's and Schoof's names as possibly involved with the union. (4/28/16 Hrg. Tr. 385:1-19, PgID 394.) This—along with the allegation Charter subsequently "isolated" these employees as a result—relies solely on Teenier. Teenier's relationship with the truth is distant. (Charter Br. 22.) Even so, Teenier testified he never believed DeBeau was involved with union activity and he never heard anyone at Charter say it needed to fire DeBeau because of his union activity. (4/29/16 Hrg. Tr. 502, 512, 515-517, PgID 512, 522, 525-527.) The off-hand remark of an unidentified manager that is contradicted by the management notes is not "substantial evidence" Charter suspected either DeBeau or Schoof of supporting the union.

2. There was not substantial evidence of pretext.

The General Counsel incorrectly claims that Charter relied exclusively on Lothian's interview when it fired DeBeau and Schoof. As the ALJ found, "[i]n its totality, the evidence suggests that when Felker discovered Schoof and DeBeau working at Schoof's, they were still on the clock." (11/10/16 ALJ Decision 17, PgID 2257.) DeBeau admitted he had hidden critical information from Peters about how many times he had worked at Schoof's house and whether Felker had been there. (6/2/16 Hrg. Tr. 1124, 1134, 1138-1142, PgID 1137, 1147, 1151-1153.) Schoof admitted he had been dishonest with Peters, which is why the ALJ correctly found Charter would have discharged Schoof because it believed he was dishonest during his interview. (11/10/16 ALJ Decision, 19-20, PgID 2259-2260; 6/2/16 Hrg. Tr. 1195, PgID 1208.)[4]

The General Counsel asks this Court to reverse the ALJ's credibility determinations by trying (and failing) to poke holes in Lothian's credibility. (NLRB Br. 53-54.) *See Jolliff v. N.L.R.B.*, 513 F.3d 600, 615 (6th Cir. 2008) (ALJ's credibility determination "is persuasive."); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. N.L.R.B.*, 844 F.3d 590, 598 (6th Cir. 2016) (ALJ's

[4] The General Counsel's attempt to parse out and defend Schoof's making up a story and telling it to Charter as truth in an attempt "not to lose his job" is not reflective of his credibility at the hearing or supportive of Charter's determination he was not being truthful. (NLRB Br. 56 n.2.)

findings "'are part of the record we must review' and therefore are considered 'to the extent that they reduce the weight of the evidence supporting the Board's conclusion.'" (citations omitted).)

The General Counsel cites no evidence that supports its claim Lothian knew Teenier had good productivity numbers (the email relied on does not include Lothian, and no other connection is apparent). (NRLB Br. 51; GC Ex. 41, PgID 2113.) The General Counsel does not explain any uninvestigated "special projects" nor is any record evidence cited. (NLRB Br. 54-55; Resp. Ex. 9, PgID 2145-2148.) Lastly, it claims that because Teenier's friend and rental tenant offered a different story than Lothian, that it was unreasonable to believe Lothian. (NLRB Br. 54.) Based on the totality of what Charter knew, however, there is not substantial evidence that it was unreasonable to terminate DeBeau and Schoof. The cases relied on by the General Counsel—in which companies performed obviously sham investigations (NLRB Br. 53) —are a far cry from Charter's interviewing eight witnesses multiple times and reviewing hundreds of pages of documents.[5]

[5] *See Bourne Manor Extended Health Care Facility*, 332 NLRB 72, 80 (2000) (company accepted word of employee's husband over employee and other long-time employees, despite knowing husband "was out for revenge against his wife, had been a patient at an area mental institution during the investigation of [employee's] alleged theft, and had been arrested in October for a violation of the restraining order against him." *Burger King Corp*., 279 NLRB 227, 239 (1986)

Finally, as noted above, the attempt at showing Charter treated comparable employees less severely lacks context and necessary information about the alleged comparators, while assuming that all instances of alleged dishonesty warrant the same treatment. *See above* Section I.A.1.

C. The Board erred by considering the untimely allegations in the Complaint.

The parties agree that the Board could only consider the untimely allegations if they were "closely related" to the timely ones, and that this determination rests on a set of three factors articulated in the *Redd-I* case: "(1) whether the otherwise untimely allegations of the amended charge involve the same legal theory as the allegations in the timely charge; (2) whether the otherwise untimely allegations of the amended charge arise from the same factual situation or sequence of events as the allegations in the timely charge; and (3) whether a respondent would raise the same or similar defenses to both the untimely and timely charge allegations." *Wge Fed. Credit Union*, 346 NLRB 982, 983 (2006), citing *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988).

For the first factor of the *Redd-I* test, the General Counsel repeats the Board's errant analysis that all the untimely and timely allegations involved the

(company merely asked employee "what happened," did not tell employee accusations against him, and did not give him opportunity to defend himself).

same legal theory because they focused on conduct that "had a reasonable tendency to discourage union activity." (NLRB Br. 20.) Yet the Board and the courts have routinely rejected such a broad theory of "relatedness." *See The Smithfield Packing Co., Inc., Tar Heel Div. & United Food & Commercial Workers Union, Local 204, AFL-CIO, CLC*, 344 NLRB 1, 10 (2004) (allegations did not involve same legal theory despite both generally including anti-union discrimination); *Reebie Storage & Moving Co. v. N.L.R.B.*, 44 F.3d 605, 609 (7th Cir. 1995) ("a certain levels of legal abstraction, any two allegations [of violations of the Act] are capable of being deemed 'related.'"); *Drug Plastics & Glass Co. v. N.L.R.B.*, 44 F.3d 1017, 1021-22 (D.C. Cir. 1995) ("allegations which are related by mere legal theory are not 'closely related' for purposes of § 10(b)…."); *Sam's Club, a Div. of Wal-Mart Stores, Inc. v. N.L.R.B.*, 173 F.3d 233, 246 (4th Cir. 1999) ("nor is it enough that the events simply occurred during the same union organizing campaign or reflected anti-union animus"). None of the authority cited by the General Counsel supports this watered-down interpretation of the first *Redd-I* prong. Moreover, the Board has not provided any explanation for harmonizing this case with its prior cases (or those of the Courts of Appeal) or for changing its doctrine. This is, itself, reason to set aside this finding. (NLRB Br. 18-23.) *See Kellogg Co. v. N.L.R.B.*, 840 F.3d 322, 333 (6th Cir. 2016).

As to the second prong regarding same sequence of events, the record does not support a link between the limited union activity in July and the terminations in October. There is no evidence of any union activity after July 15. The only evidence of management activity relating to unions after early August is Teenier's vague assertion that there were infrequent conference calls relating to the union until his termination. (4/28/16 Hrg. Tr. 390:3-18, PgID 399.)[6] Teenier, who regularly contacted the General Counsel's other witnesses, is not a credible witness as to this fact. There is no evidence of the content of these calls after the union activity died down in July, and no substantial evidence they related to French, DeBeau, or Schoof. Further, French was not "repeatedly singled out" by Charter during this timeframe; after the initial July 15 handbilling, French's entire team (including two technicians with no union involvement) were re-assigned—that is it. Finally, the General Counsel glosses over the different actors involved in the timely and untimely allegations by citing to Culver, who was involved in the terminations and one of the untimely allegations (paragraph 10, the ride-along with French). (NLRB Br. 22.) The charges in paragraph 7, 8, and 13 alleged conduct by Teenier and other managers.

[6] Those who actually knew clearly testified that these meetings ended in early August 2014. (Charter Brief 11; 5/31/16 Hrg. Tr. 699-700, PgID 710-711.)

As for the third *Redd-I* prong, the General Counsel concedes that Charter does not have similar legal defenses to the timely and untimely claims by not addressing the issue. (Charter Br. 45-47.) Instead, the General Counsel argues Charter should have known to preserve evidence of other "anti-union" activity when French filed his timely charge relating to his termination. (NLRB Br. 22.) French's charge related to the September 30, 2014 conversation with Lothian and his termination put Charter on notice to preserve evidence related to those ***events***: the conversation with Lothian and the termination. Charter did not and could not know that—15 months later—the General Counsel would later tie these events to earlier, unrelated ones through its own theory on Charter's motives. *See Smith's Food & Drug Centers, Inc.*, 361 NLRB 1216, 1217 (2014) (third prong of *Redd-I* met because both timely and untimely charges related to the same interview of employee and whether it violated *Weingarten*).

The timely and untimely allegations relate to the same employee and generally rely on the same ***general allegation*** of anti-union animus, but this does not make them "closely related" under 10(b). Expanding "closely related" so broadly would negate Congress' intent to put a reasonable time limit on charges. *See Ross Stores, Inc.*, 235 F.3d 669, 673 (2001); *Drug Plastics & Glass Co.*, 44 F.3d at 1021-22.

D. The Board erred by concluding Charter otherwise violated the Act.

1. Charter did not engage in coercive surveillance on July 15, 2014 (paragraph 7).

The ALJ correctly held that Charter had not engaged in coercive surveillance when, on July 15, 2014, three Charter supervisors observed union activity in the open parking lot adjacent to Charter's facility. (11/10/16 ALJ Decision & Order 4, 23, PgID 2244, 2263; 8/15/16 Hrg. Tr. 1619-1620, PgID 1634-1635.) The supervisors were outside solely to make sure that the union organizers did not trespass on Charter's property or block traffic. (11/10/16 ALJ Decision & Order 4, 23, PgID 2244, 2263.) When they satisfied themselves that these things were not occurring, they went back inside Charter's building. (*Id*.) None wrote down the names of the employees who may have supported the union. (*Id*.)

The Board has often held that management officials may observe public union activity, particularly where such activity occurs on company premises, without violating Section 8(a)(1) of the Act, unless such officials do something out of the ordinary. *Metal Indus., Inc*., 251 NLRB 1523 (1980) (citing *Chemtronics, Inc*., 236 NLRB 178 (1978)); *G. C. Murphy Co.*, 216 NLRB 785, n.2 (1975); *Larand Leisurelies, Inc*., 213 NLRB 197, 205 (1974); *Tarrant Mfg. Co.*, 196 NLRB 794, 799 (1972). This is very different from the situations cited by the General Counsel establishing "out of the ordinary" behavior. (NLRB Br. 23.) *See*

Partylite Worldwide, Inc., 344 NLRB 1342 (2005) (where "eight high-ranking managers and supervisors stood at entrances to the employee parking lot watching" handbilling without explanation); *Gainesville Mfg. Co.*, 271 NLRB 1186, 1188 (1984) (supervisor asked handbillers to leave, called police on them, and physically blocked handbilling); *DHL Express, Inc.*, 355 NLRB 680, 681 (2010) (finding "no explanation" for security guards standing among handbillers for "sustained period of time," calling police on handbillers, and surrounding union official's car).

2. Charter did not give the impression of surveillance, solicit grievances, threaten closer supervision, or coercively interrogate employees on July 16, 2014 (paragraphs 8(a)-(d)).

The General Counsel employs colorful mischaracterizations of what happened on July 16, 2014, claiming Teenier "confronted" French and "required him to engage" in a conversation. (NLRB Br. 25.) The record is directly otherwise; nothing supports these characterizations. French said that Teenier asked him if French "had any idea of what went on at the office or had any – knew of anyone that did anything with union stuff." (4/26/16 Hrg. Tr. 51-52, PgID 58-59.) French told Teenier "no" and Teenier "acted nonchalant about it, like oh yeah, these things usually blow over." (*Id.*) That was the extent of it. Teenier corroborated this, testifying that he met with French of his own accord, mentioned the handbilling

but did not ask French about French's union views or whether he was supporting the union. (4/29/16 Hrg. Tr. 509, PgID 519.)

The General Counsel concedes that its two witnesses told different stories. Teenier claimed he initiated the conversation; French, however, claimed Felker did. (*Id.* at 506, PgID 516; 4/26/16 Hrg. Tr. 51, PgID 58.) French testified that ***after*** his termination Teenier allegedly told him French had been the "focus of a lot of conference calls and face-to-face meetings about union activity" – a fact Teenier had omitted from sworn affidavits to the NLRB (4/26/16 Hrg. Tr. 83, PgID 90). Based on this, Teenier's testimony is not substantial evidence that Charter violated the Act.

a. There was no impression of surveillance.

To support some of these allegations, the Board is quick to jettison French's testimony. Apparently, the Board understands that French is not a credible witness. For instance, the General Counsel and Board only find an impression of surveillance by ignoring French's testimony and crediting Teenier's contradictory version of the conversation. French said Teenier asked him if he "had any idea of what went on" with the "union stuff." (*Id.* at 51-52, PgID 58-59.) French said Teenier told him ***after his termination*** that he had been the "focus" of management meetings about union activity. (*Id*. at 83, PgID 90.) There cannot be substantial evidence supporting an impression of surveillance finding if the complaining party

did not support the General Counsel's version of the conversation. Teenier's general inquiry if French had any idea what happened with the handbilling would not give a reasonable employee an impression of surveillance, and does not amount to a violation of the Act. *See N.L.R.B. v. Pilgrim Foods, Inc.*, 591 F.2d 110, 114 (1st Cir. 1978) ("The Act does not prevent an employer from acknowledging an employee's union activity, without more….").

b. Charter did not threaten French with closer supervision.

The Board likewise chose to rely on Teenier over French to find Charter threatened him with closer supervision. French testified he never felt threatened by Teenier, and did not testify that Teenier said anything to him about being supervised. (4/27/16 Hrg. Tr. 109, PgID 117.) This fact is not "irrelevant" as the General Counsel suggests (NLRB Br. 30), because it is further evidence Teenier's account cannot be credited. French testified that Teenier told him management had been looking at him only after French was terminated. (Charter Br. 50-53.) Given French's testimony on the July 16, 2014 conversation, there is not substantial evidence he was threatened with closer supervision.

c. Charter did not coercively interrogate French.

The only union-related question Teenier supposedly asked was whether French knew about the handbilling. (4/28/16 Hrg. Tr. 381-382, PgID 390-391.)

French felt uncomfortable and changed the subject, and that was it. Per French, there was no talk about management identifying him as involved with the union, or anything else. It was a "fairly short" conversation. (*Id.* at 15-25, PgID 22-32.). Indeed, the conversation with Teenier was such a non-event for French, he never told the Board about it. (4/27/16 Hrg. Tr. 193-194, PgID 201-202.) Considering the relevant factors—such as the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether or not the employee being questioned is an open and active union supporter, *Norton Audubon Hospital*, 338 NLRB 320, 320-21 (2002)—there is not substantial evidence Charter coercively interrogated French.

d. Charter did not solicit grievances from French.

The General Counsel relies on *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), which only highlights why Charter did not improperly solicit grievances from French. (NLRB Br. 31.) In *Reliance Electric*, the company's personnel manager and division manager held a series of meetings with employees during a union organizing campaign specifically "to hear suggestions from the employees as to their jobs, what we might do to help them, and ... to voice any complaints so we might adjust [them] where possible." 191 NLRB at 44. They had never held such meetings before, and the company promised it would "look[] into" the employees' complaints. *Id.* at 46. The Board held that "there is no doubt that a

management official solicited complaints at the . . . meetings and *explicitly* promised employees that Respondent would strive to adjust them." *Id*. (emphasis in original).

Here, on the other hand, Teenier and French knew each other, worked together, and got along; Teenier *at most* told French that if French had any problems with him, to let him know. (3/27/18 NLRB Decision & Order 5, PgID 2387.) The General Counsel cites nothing about this interaction that would imply improper solicitation, other than pointing out the unremarkable fact that Charter's generally advises employees to bring concerns first to their direct supervisor. This alone is not substantial evidence Charter violated the Act. *See, e.g.*, *Sweet Street Desserts*, 319 NLRB 307, 307 (1995) (finding employer solicited grievances during conversation with employee that included a threat about unionizing); *Albertson's, LLC*, 359 NLRB 1341 (2013) (finding employer solicited grievances where director of labor relations—previously unknown to an employee—met directly with the employee during union organizing to ask if she had any concerns about her work).

3. Culver did not "subject French to closer scrutiny" by going on a ride-out with him on July 17, 2014.

While the General Counsel points out that French did not know Culver or have ride-outs under the previous regional manager, it does not dispute that: (1)

Culver regularly conducted ride-outs to get to know employees (8/16/16 Hrg. Tr. 1660-1661, PgID 1676-1677); (2) Culver chose to do a ride-out with French at that time because Felker and Teenier told Culver that French had some questions about Charter (*id.* at 1662, PgID 1678); (3) to the extent the topic of union activity arose, French admits he (not Culver) initiated the subject and Culver immediately switched the conversation back to other matters (4/26/16 Hrg. Tr. 54, PgID 61); and (4) there is no evidence Culver scrutinized French's work during the ride-out – they were merely discussing French's questions about how the TQA evaluations were conducted (8/16/16 Hrg. Tr. 1663-1665, PgID 1679-1681).

The General Counsel relies on *N.L.R.B. v. Homemaker Shops, Inc.*, 724 F.2d 535 (6th Cir. 1984), but that case underscores why the Board's finding here was not supported by substantial evidence. (NLRB Br. 33.) In *Homemaker*, the store manager had "stood approximately a foot and a half away from" an employee when she was on the phone, and afterwards said in a "quasi-joking manner, that the Company president had instructed him to monitor her phone calls for conversations with or concerning the outside union, and to report back if any took place." *Id*. at 541. Here, Culver neither said nor did anything to suggest scrutiny.

4. Charter did not reassign work locations of French, Schoof, and DeBeau to isolate them.

The General Counsel does not dispute the facts underlying Charter's reason for the re-assignment: that it had to audit all customers in Michigan, that Charter had already audited the urban system of Saginaw, and that it previously had assigned the employees to audit rural areas like this. (4/27/16 Hrg. Tr. 122, PgID 130; 6/2/16 Hrg. Tr. 1024, 1073-1074, PgID 1037, 1086-1087.) Charter has affirmatively proven it would have taken the same actions in the absence of anti-union animus. (Charter Br. 27, 29-30.) As such, the differing and conflicting accounts presented by the General Counsel's witnesses over an alleged order to isolate are irrelevant. (NLRB Br. 34-35.) In light of the full record about the legitimate business reason for the move, there is not substantial evidence Charter isolated the employees. (Charter Br. 9-10.)

5. Charter did not give an impression of surveillance or threaten French with termination because of his union activity on September 30, 2014.

According to French, the primary subject of the September 30, 2014 conversation between him and Lothian was the HR investigation Lothian had initiated. (4/26/16 Hrg. Tr. 66:8-68:22, PgID 73-75.) Lothian's alleged "union mastermind" comment was, in context, purely offhand. None of what Lothian said would give a reasonable person in French's position the impression of surveillance or a threat of

termination ***because of union activity***. Even though French was the only person who testified about this conversation, the Board rejected French's own understanding of what was said. In light of this, there is not substantial evidence to support the Board's finding.

CONCLUSION

Charter respectfully requests that the Court set aside the March 27, 2018 Decision and Order and hold that Charter did not violate the Act as set forth therein.

Dated: February 26, 2019

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation pursuant to Fed. R. App. P. 32(a)(7)(B). The foregoing brief contains 5,336 words of Times New Roman 14-point proportional type. The word processing software used to prepare this brief was Microsoft Word 2010.

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CERTIFICATE OF SERVICE

This certifies that Charter Communication, LLC's Opening Brief was served on February 26, 2019, by electronic mail using the Sixth Circuit's Electronic Case Filing system on: David Habenstreit, Kira D. Vol, and Eric Weitz.

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DESIGNATION OF RECORD

All record designations are to the Agency Record filed on August 20, 2018 as R.12 on the Court of Appeals' docket.

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